

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE: B-211830

DATE: February 10, 1984

MATTER OF: Amray, Inc.

DIGEST:

TWX message notifying the contracting agency that the sender was protesting a solicitation and had requested a formal ruling by the GAO, but did not specify the grounds for the protest or request the agency to take remedial action, was not a protest to the agency; its receipt by the agency on the closing date for receipt of offers cannot convert a protest concerning alleged solicitation improprieties filed with GAO after that date into a timely protest.

Amray, Inc. protests the proposed issuance by the Kennedy Space Center, Florida, of a purchase order to International Scientific Instruments, Inc. (ISI) under ISI's Federal Supply Schedule contract No. GS-00S-45083 with the General Services Administration. The proposed order for a scanning electron microscope and related accessories is in response to purchase request No. 3042-5150. The protester contends the purchase request was unduly restrictive of competition because it contained an item-by-item description of ISI's equipment. We dismiss the protest because it is untimely.

The record indicates that by letters dated March 31, 1983, the Space Center requested two vendors holding multiple award schedule contracts to submit technical data and prices on a scanning electron microscope system, Special Item No. 66-227b on the schedule, in accordance with specifications accompanying the letters. As part of the National Aeronautics and Space Administration, the Space Center is a mandatory user of these multiple award schedule contracts. At the time, these two were the only schedule vendors listed for this item. By the week of April 24, however, ISI, the protester, and another vendor, each had called the Center to report that GSA had awarded

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it a schedule contract after the schedule had been printed. The Center responded by sending these vendors copies of the specifications and inviting replies on or before May 4.

On May 3, a representative of the protester called the Center to complain about the short time allowed for the submission of quotes and to request an extension. The protester's representative was informed that no extension would be granted. The representative also complained about the restrictive nature of the specifications, but did not identify which specifications the protester believed were restrictive.

Four of the vendors invited to submit a quotation did so; three of these offers were acceptable. The protester did not submit a quotation. Instead, the protester submitted to the contracting officer the following TWX message, received by the Center on May 4:

"This letter formally notifies the procuring agency that Amray Inc. officially protests this solicitation under the rules and regulations set forth by the GAO Bid Protest Procedures. A formal request for a ruling has been submitted to the GAO. The protest was issued prior to a bid opening and expect NASA to withhold this [award] of contract until a decision has been made."

By letter dated May 12 and received on May 17, the protester wrote to this Office protesting the allegedly unduly restrictive specifications. It stated that its letter was an "official protest" which had been "confirmed" with the contracting officer on May 4.

Our Bid Protest Procedures provide that protests based upon alleged improprieties that are apparent in a solicitation must be filed prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(b)(1) (1983). Although our procedures encourage protesters to seek resolution of their complaints initially with the contracting agency, protesters may choose to protest either to the agency or to this Office. If a protest is filed initially with the contracting agency, any subsequent

protest to this Office filed within 10 days of notice of initial adverse action on the agency protest will be considered, provided the initial protest to the agency was timely. 4 C.F.R. § 21.2(a).

The protester's complaint that the specifications were unduly restrictive involves an alleged impropriety that was apparent from the Center's letter requesting offers. Thus, the protester was required to file its protest on this issue with either the agency or this Office prior to the date for receipt of offers, in this case May 4.

We conclude that the protester did not file a timely protest. As we read the TWX message received by the agency on May 4, the protester was merely notifying the agency of its intent to protest to this Office and was not filing a protest with the agency. The message indicated that Amray was protesting "under the rules and regulations set forth by the GAO Bid Protest Procedures," and informed the contracting officer that a formal request for a ruling had been submitted to this Office. The message did not specify the grounds for the protest, request the agency to take remedial action, or otherwise indicate that it was intended as a protest to the agency. Significantly, in its protest received here on May 17, the protester characterized its TWX message on May 4 as merely confirmation of its protest to this Office. It is also of some significance that the agency treated the message as simply an indication of an intent to protest. In short, we believe that the May 4 TWX message is properly viewed as an information copy of a protest to this Office. Its receipt by the contracting agency did not operate as an agency protest and cannot convert an otherwise untimely direct protest to this Office into a timely protest. See Society Brand, Incorporated, 55 Comp. Gen. 133 (1975), 75-2 CPD 91; Medical Devices of Fall River, Inc.--Reconsideration, B-207276.3, December 21, 1982, 82-2 CPD 558.

For the benefit of the protester, we point out that the protest appears to be without merit. First, the fact that the agency received three acceptable offers for its requirement undercuts the protester's contention that

the specifications restricted competition. Moreover, the essential premise of a protest involving an allegation that specifications are restrictive is that but for the allegedly unduly restrictive specifications, the protester could offer to provide goods or services that satisfy the government's minimum needs. Here, Amray has not shown, or even alleged, this to be the case. When, in response to this protest, the Center reviewed the product description of the scanning electron microscope on Amray's GSA schedule contract, it found that Amray's microscope did not include automatic stage control, a feature the Center considers critical. Amray does not contend that it could provide a product with this feature, nor does it argue that the requirement for the feature exceeds the Center's minimum needs. It thus appears that Amray is not a possible source of supply for the equipment.

The protest is dismissed.

Harry R. Van Cleve
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Acting General Counsel